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MONTANA LEGISLATIVE HISTORY

Chapter 319 1983

Bill H _____ SB 2 Original bill & history ✓ C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	_____	___C	Hearing Date(s)	1/19	___C
	3/16	___C	ex	1/20	___C
ex	3/22	___C		_____	___C
	_____	___C		_____	___C
Date Out	_____	___C			

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

SENATE

SB 1 -- MAZUREK -- TO PERMIT A COUNTY ATTORNEY TO REQUEST THE SENTENCE REVIEW DIVISION OF THE MONTANA SUPREME COURT TO REVIEW A SENTENCE IN A CRIMINAL CASE FOLLOWING CONVICTION ....
BY REQUEST OF: THE JOINT SUBCOMMITTEE ON JUDICIARY

INTRODUCED: 1/3/83
REFERRED TO COMMITTEE ON JUDICIARY: 1/3/83
HEARING: 1/11/83
REPORT: 01/14/83, DO NOT PASS. REPORT ADOPTED.
BILL KILLED.

SB 2 -- AKLESTAD -- PROHIBITING, EXCEPT UNDER CERTAIN CIRCUMSTANCES, APPELLATE REVIEW OF ALLEGED ERRORS NOT OBJECTED TO DURING A CRIMINAL TRIAL ....
BY REQUEST OF: THE JOINT SUBCOMMITTEE ON JUDICIARY

INTRODUCED: 1/3/83
REFERRED TO COMMITTEE ON JUDICIARY: 1/3/83
HEARING: 1/19/83
REPORT: 01/20/83, DO PASS
2ND READING: 01/22/83 AYES: 45; NAYS: 2
3RD READING: 01/25/83 AYES: 47; NAYS: 3

TRANSMITTED TO HOUSE: 1/25/83
REFERRED TO COMMITTEE ON JUDICIARY: 01/26/83
HEARING: 3/16/83
REPORT: 03/22/83, BE CONCURRED IN
2ND READING: 03/22/83, BE CONCURRED IN AYES: 73; NAYS: 8
3RD READING: 03/23/83, BE CONCURRED IN AYES: 87; NAYS: 4

RETURNED TO SENATE: 3/23/83

TRANSMITTED TO GOVERNOR: 03/30/83
SIGNED: 4/2/83, CHAPTER 319

SB 3 -- MAZUREK -- TO REQUIRE THE CLERK OF DISTRICT COURT IN CERTAIN COUNTIES TO PROVIDE FOR THE RANDOM ASSIGNMENT OF JUDGES IN CIVIL AND CRIMINAL CASES.
BY REQUEST OF: THE JOINT SUBCOMMITTEE ON JUDICIARY

INTRODUCED: 1/3/83
REFERRED TO COMMITTEE ON JUDICIARY: 1/3/83
HEARING: 1/7/83
REPORT: 01/11/83, DO NOT PASS. REPORT ADOPTED.
BILL KILLED.

SB 4 -- MAZUREK -- REQUIRING THE APPELLANT IN A CRIMINAL APPEAL TO ORDER IN WRITING A TRANSCRIPT OF THE TRIAL COURT PROCEEDINGS.
BY REQUEST OF: THE JOINT SUBCOMMITTEE ON JUDICIARY

INTRODUCED: 1/3/83
REFERRED TO COMMITTEE ON JUDICIARY: 1/3/83
HEARING: 1/6/83
REPORT: 01/11/83, DO PASS, AS AMENDED
2ND READING: 01/13/83 AYES: 45; NAYS: 0
3RD READING: 01/15/83 AYES: 45; NAYS: 0

SENATE BILL NO. 2

INTRODUCED BY AKLESTAD

BY REQUEST OF THE JOINT SUBCOMMITTEE ON JUDICIARY

IN THE SENATE

January 3, 1983	Introduced and referred to Committee on Judiciary.
January 20, 1983	Committee recommend bill do pass. Report adopted.
January 21, 1983	Bill printed and placed on members' desks.
January 22, 1983	Second reading, do pass.
January 24, 1983	Correctly engrossed.
January 25, 1983	Third reading, passed. Ayes, 47; Noes, 3. Transmitted to House.

IN THE HOUSE

January 26, 1983	Introduced and referred to Committee on Judiciary.
March 22, 1983	Committee recommend bill be concurred in. Report adopted.
	Second reading, concurred in.
March 23, 1983	Third reading, concurred in.

IN THE SENATE

March 24, 1983	Returned to Senate. Sent to enrolling.
	Reported correctly enrolled.

SENATE BILL NO. 2

INTRODUCED BY AKLESTAD

BY REQUEST OF THE JOINT SUBCOMMITTEE ON JUDICIARY

A BILL FOR AN ACT ENTITLED: "AN ACT PROHIBITING, EXCEPT UNDER CERTAIN CIRCUMSTANCES, APPELLATE REVIEW OF ALLEGED ERRORS NOT OBJECTED TO DURING A CRIMINAL TRIAL; AMENDING SECTIONS 46-20-104 AND 46-20-702, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 46-20-104, MCA, is amended to read:

"46-20-104. Scope of appeal by defendant. (1) An appeal may be taken by the defendant only from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant.

(2) Upon appeal from a judgment, the court may review the verdict or decision and any ~~order or decision~~ alleged error objected to which involves the merits or necessarily affects the judgment. Failure to make a timely objection during trial constitutes a waiver of the objection except as provided in 46-20-702."

Section 2. Section 46-20-702, MCA, is amended to read:

"46-20-702. Types of errors noticed on appeal. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. ~~Defects~~ No

LC 0004/01

claim alleging an error affecting jurisdictional or constitutional rights may be noticed ~~although they were not brought to the attention of the trial court~~ on appeal, if the alleged error was not objected to as provided in 46-20-104, unless the defendant establishes that the error was prejudicial as to his guilt or punishment and that:

(1) the right asserted in the claim did not exist at the time of the trial and has been determined to be retroactive in its application;

(2) the prosecutor, judge, or a law enforcement agency suppressed evidence from the defendant or his attorney that prevented the claim from being raised and disposed of; or

(3) material and controlling facts upon which the claim is predicated were not known to the defendant or his attorney and could not have been ascertained by the exercise of reasonable diligence."

-End-

INTRODUCED BILL

48th LEGISLATIVE SESSION

COMMITTEE ON Senate Judiciary

SENATE BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO Pass DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CONCURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CONCURRED IN DATE
1	1-3-83	1-11-83	1-14-83		1-14-83				
2	1-3-83	1-19-83	1-20-83	1-20-83					
3	1-3-83	1-7-83	1-11-83		1-11-83				
4	1-3-83	1-6-83	1-11-83			1-11-83			
5	1-3-83	1-13-83	1-14-83		1-14-83				
7	1-3-83	1-13-83	1-14-83			1-14-83			
9	1-3-83	1-6-83	1-11-83		1-11-83				
14	1-3-83	1-4-83	1-4-83	1-4-83					
15	1-3-83	1-4-83	1-4-83	1-4-83					
22	1-3-83	REFERRED TO PUBLIC HEALTH							
23	1-3-83	1-12-83	2-4-83			2-4-83			
25	1-3-83	1-19-83	TABLED						
26	1-3-83	1-21-83	2-7-83			2-7-83			
30	1-3-83	1-26-83	TABLED						
37	1-3-83	1-12-83	2-4-83			2-4-83			
39	1-3-83	1-11-83	1-11-83		1-11-83				

(Use Separate Sheet for Senate, House Bills, and Resolutions)

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MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
January 19, 1983

The tenth meeting of the Senate Judiciary Committee was called to order by Chairman Jean A. Turnage on January 19, 1983 at 10:00 a.m. in Room 405, State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF SENATE BILL 109:

AN ACT TO REVISE THE LAW RELATING TO ENFORCEMENT OF SUPPORT; MAKING DEADLINES UNIFORM; ESTABLISHING FLEXIBLE HEARING DATE REQUIREMENTS; AMENDING SECTIONS 40-5-222, 40-5-226, AND 40-5-241, MCA.

Senator Towe, co-sponsor of this bill, explained to the Committee that SB109 was drafted at the request of the Department of Revenue. It was their feeling that there is a need for uniform deadlines and flexible hearing dates in the enforcement of support. This bill deals with the time frame for collection of support and the date of service for notice. Representative Fabrega, also a co-sponsor of SB109, was noted as being present.

Jon Meredith of the Department of Revenue was present to answer questions.

There being no opponents, the hearing was opened to questions from the Committee.

Senator Daniels questioned the grammatical wording of the amendment. Jon Meredith explained that it was prepared in this manner as it was taken directly from a district judge's order.

Senator Berg questioned how soon "reasonably soon" was as worded on page 3, line 2 of the bill. Jon Meredith advised "reasonably soon" referred to as quick as the Department of Revenue hearings officer could schedule the hearing.

Senator Mazurek questioned the deadline for notice to the responsible parent and Senator Towe acknowledged a need to be more specific here. It was the concensus of the Committee that SB109 should be amended to require notice to the parent a specified number of days prior to the hearing.

CONSIDERATION OF SENATE BILL 2:

AN ACT PROHIBITING, EXCEPT UNDER CERTAIN CIRCUMSTANCES, APPELLATE REVIEW OF ALLEGED ERRORS NOT OBJECTED TO DURING A CRIMINAL TRIAL; AMENDING SECTIONS 46-20-104 AND 46-20-702, MCA.

Senator Aklestad, advised the Committee that this bill was prepared at the request of the Joint Subcommittee on Judiciary. Senator Aklestad was also petitioned by many people of the Conrad, Montana area (see Exhibit "A" attached) as to the necessity for legislation to limit the number of appeals which the taxpayer must pay for. SB2 is an act to limit the issues which can be raised by a criminal defendant on appeal. It specifically will prohibit appellate review of alleged errors not objected to during a criminal trial. Senator Aklestad distributed an article from the Great Falls Tribune (Exhibit "B") which demonstrates the abuse of the appeal process, along with information regarding the case of State v. McKenzie (Exhibit "C").

John Maynard of the Attorney General's Office, spoke as a proponent to SB2. He explained that it is very technical and does have ramifications but that it applies only to criminal appeals. He stated that the bill will help reduce the delay now apparent in criminal appeals by preventing defense attorneys from planting error in the record to be used as a basis for later appeals. He said the exceptions on page 2, line 6 for prejudicial error should cover those instances of error similar to the "cause and error" exceptions to the federal contemporaneous objection rule, found in the case law of the federal courts.

Marc Racicot, representing the County Attorney's Association, also spoke in support of SB2. He stated this bill was proposed after a great deal of discussion and study by the interim Judiciary Subcommittee. There is a problem with too many long appellate court delays. Criminal trials are being used as a game of skill rather than a search for truth. SB2 would alleviate the appeals where the initial objections were not noted in the lower court. All the merits of the case should be brought forward during the initial trial, not saved for appeals when an appeal is necessary. The appellate courts are taking the attitude of disbelief that anything is done right at the lower court level. There is no finality to the process and the public is frustrated with the impotence of the system. The appellate process now reflects tentativeness and lack of resolve. SB2 would contribute significantly to finality of the process. The accused already has every advantage.

There being no further proponents, the hearing was opened to opponents of SB2.

Karla Gray, representing the Montana Trial Lawyer's Association, spoke in opposition to this bill. She felt that the Committee should leave the statute as it now reads. The statute as it now reads says the Supreme Court "may" take notice of constitutional defects and it is her opinion that this wording is sufficient. She stated that an error not included in SB2 is where defendant's counsel did not make a timely objection. She also felt that SB2 would penalize a criminal defendant if he had an appointed counsel

who did not represent him effectively. She said the focus on appeal under SB2 would turn from the plain error rule to inadequacy of counsel.

Wes Krawczyk, representing the American Civil Liberties Union, also spoke as an opponent to SB2. He felt that innocent people should not be made to suffer from an attorney's failure to object and that SB2 limits the grounds to appeal and could be considered unconstitutional.

There being no further proponents and opponents, the hearing was opened to questions from the Committee.

Senator Halligan questioned the shift from the plain error rule to that of inadequacy of counsel and John Maynard explained that the real place SB2 is effective is when the defendant alleges error.

Senator Crippen expressed his concern for the search for truth. He felt that this search for truth continues into and through the appeal process and he questioned if SB2 would be limiting that search. Marc Racicot replied that the search should be confined to the record. Chairman Turnage stated that the search for truth is usually unilateral in that defense attorneys are not much interested in the truth.

Senator Aklestad closed by stating that people lack confidence in the judicial system. It was not the intention of this bill to take away the appeal process, only to discourage the abuses and prolonged appeals.

There being no further questions from the Committee, hearing on SB2 was closed.

CONSIDERATION OF SENATE BILL 25:

AN ACT TO PROVIDE THAT THE MONTANA SUPREME COURT MAY, AFTER INITIAL REVIEW OF THE FACTS AND LAW OF A CASE DECIDED BY A DISTRICT COURT, BY WRITTEN ORDER GRANT OR DENY AN APPEAL ON THE MERITS OF THE CASE; REQUIRING THAT APPEALS ON THE MERITS BE HEARD IN CERTAIN INSTANCES; AMENDING SECTIONS 3-2-204, 3-2-601, 46-20-104, 46-20-105, 46-20-201, 46-20-203 THROUGH 46-20-205, 46-20-405, 46-20-406, 46-20-513, 46-20-603, AND 46-20-701, MCA; REPEALING SECTIONS 46-20-101 THROUGH 46-20-103 AND 46-20-202, MCA; AND PROVIDING A CONTINGENT EFFECTIVE DATE."

ROLL CALL

JUDICIARY COMMITTEE

48th LEGISLATIVE SESSION - - 1983 Date 1-19-83

NAME	PRESENT	ABSENT	EXCUSED
Berg, Harry K. (D)	✓		
Brown, Bob (R)	✓		
Crippen, Bruce D. (R)	✓		
Daniels, M. K. (D)	✓		
Galt, Jack E. (R)	✓		
Halligan, Mike (D)	✓		
Hazelbaker, Frank W. (R)	✓		
Mazurek, Joseph P. (D)	✓		
Shaw, James N. (R)	✓		
Turnage, Jean A. (R)	✓		

Each day attach to minutes

DATE January 19, 1983

COMMITTEE ON Judiciary BILL NO. 2, 25 & 109

VISITOR'S REGISTER

NAME	REPRESENTING	Check One: Support	Check One: Oppose
Mike Abley	Supreme Court		
Wes Krawczyk	A.C.L.U. of Mont.		SB2 SB25
Karla Gray	Mont. Trial Lawyers Assoc.		SB2 SB25
Theresa England			
John Maynard	Attorney General	SB2	
Mark Racicot	County Attorneys	SB2	
J.C. Weingartner	Exec Comm - State Bar		
Ray Anders	public		

(Please leave prepared statement with Secretary)

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Conrad, Montana
March 20, 1981

Senator Aklestad
Montana State Capitol
Helena, Montana 59601

Dear Senator Aklestad:

We the undersigned wish to support your efforts to plug the holes to limit the number of appeals that the tax payer must pay for as reported in the Independent Observer issue of March 19, 1981 under the title "Its time to quit making a mockery out of the McKenzie Case". Anything you can do to end this will be appreciated.

Name	Address
[illegible]	306 Horizon Lodge, Conrad MT.
[illegible]	" "
[illegible]	509 " "
[illegible]	511 Horizon Lodge Conrad
[illegible]	501 Central Conrad
[illegible]	6 North Front Conrad, MT.
[illegible]	216 Horizon Lodge Conrad, MT
[illegible]	
[illegible]	
[illegible]	Horizon Lodge # 402
[illegible]	Horizon Lodge 106
[illegible]	Horizon Lodge Conrad, MT.
[illegible]	
[illegible]	Horizon Lodge #301
[illegible]	104
[illegible]	405 Horizon Lodge Conrad MT
[illegible]	apt. 506 Horizon Lodge " "
[illegible]	Horizon Lodge #213 Conrad MT
[illegible]	Horizon Lodge #213 Conrad Mont 59425
[illegible]	Horizon Lodge Box 313 Conrad Mont 59425
[illegible]	Horizon Lodge #313 - Conrad Mt. 59425
[illegible]	Horizon Lodge Apt 518 - Conrad 59425
[illegible]	Horizon Lodge Conrad Mont.
[illegible]	Horizon Lodge Conrad, Mont. 59425
[illegible]	406 Horizon Lodge, Conrad, Mt. 59425
[illegible]	" " " "
[illegible]	Horizon Lodge Conrad MT 59425
[illegible]	Horizon Lodge Conrad Mont 59425
[illegible]	413 " " " " "
[illegible]	Horizon Lodge Conrad Mont.
[illegible]	Horizon Lodge Conrad Mont.

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DATE January 19, 1983

"A"

Name	Address
Ethel C. Peterson	#403 Horizon Lodge
Oscar Berland	Horizon Lodge Room 404
Minnie Berland	Horizon Lodge Room 404
Ethel F. Seifert	Horizon Lodge Room 211
Alice M. Fockler	Horizon Lodge Room 205
David Vos	Horizon Lodge 310
Jean Shay	Horizon Lodge 311
Irene Baumgardner	Horizon Lodge 312
Lettie Adams	" " 101
Katheryn N. Tracy	Horizon Lodge Room 202
Nina Berland	Horizon Lodge Room 214
Alta Miller	Horizon Lodge Room 309
Leo. Zier	Horizon Lodge apt. 311
Clara Klemenhagen	1000 11th S W. Conrad, Mt.
Alice Wheeley	Conrad, Mt.
Gladys M. Pourroy	Conrad, Mont 212
Louise Montgomery	Horizon Lodge 206
Barbara Wolvert	Conrad Mont.
Velma Caldwell	Conrad, Mt 59425

Conrad, Montana
March 24th, 1981

Senator Gary Aklestad
Montana State Capitol
Helena, Montana 59601

Dear Senator Aklestad:

We the undersigned people wish to support your efforts to plug the loop holes to limit the number of appeals that the tax payer must pay for as reported in the Independent-Observer issue March 19, 1981 under the title "It's time to quit making a mockery of McKenzie case". Anything you can do to end this inequity will be greatly appreciated.

NAME	ADDRESS
[illegible] Williams	Rt 1 Bx 12 Conrad 59425
Kathryn M. Neary	Conrad - M. Lodge 59425
[illegible] Lundstrom	Conrad M. Lodge 59425
Blanche Moritz	Conrad M. Lodge - 59425
Mike Moritz	" " " "
Pastor Dennis E Bird	" Box 457 "
Simon J Nigg	" " 59425
Cloyce Williams	" " "
Alice Venetz	" 408 So. Del 59425
Norma Keil	" 701 S Del 59425
Vernon Venetz	" 408 So Del 59425
Dorothy Flaadstol	" 511 S. Del 59425
Lena Messenger	Box 773 Conrad Mont.
Violet Belling	" 137 N. Maryland, Conrad
Lucille Gartenacn	519 - So. Melrose
Oscar A. Gartenacn	519 - So. Melrose
J. P. Strandberg	506 " "
Evelyn Strandberg	506 " "
[illegible] Neary	404 So. Iowa, Conrad, Mt. 59425
[illegible] Dunham	Horizon Ldg Conrad
Wiedha Emrick	Horizon Ldg Conrad
[illegible] Fourney	Horizon Lodge, Conrad Mt.
Rena Wittmier	Horizon Lodge Conrad Mont
[illegible] Hale	Horizon Lodge Conrad "
[illegible] Ferguson	Horizon Lodge Conrad "
[illegible] Conrad	" " "

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"A"

Wilbur Berg	Horizon Lodge Conrad, Mt
Thelma M. Berg	" " " " " "
Helen Sidd	" " " " " "
Gilbert Larson	"
Opal Mills	"
Ed McClain	Horizon Lodge Conrad Mt
[illegible]	6 No. Maryland Conrad Mt
Ella Tandy	Horizon Lodge Conrad Mt
Hattie Kaymer	Horizon Lodge #401, Conrad Mt.
Robert R. Emrick	Route 3 Box 21 Conrad
Mrs. Ruby Emrick	Route 3 Box 21 Conrad
Anna Ramsey	Star Rt. Box 22 J Conrad
Vern P. Hoch	Horizon Lodge #413 "
John Reby	404 S. Sowa. Conrad

Prolonged court appeal process is criticized

By CHARLES S. JOHNSON
Tribune Capitol Bureau

HELENA — With little discussion, the House Judiciary Committee endorsed a resolution Thursday calling for a between-sessions study of the state's criminal appeal system.

The resolution is sponsored by Sen. Gary Aklestad, R-Shelby, who is upset with the number of appeals filed by lawyers for Duncan McKenzie.

McKensie was convicted of murder in 1975 and sentenced to death for the 1974 murder of Lana Harding, a Pondera County teacher, but numerous appeals have kept him from the gallows.

In an unrelated action, the committee also recommended an interim study to investigate the state's eminent domain laws.

The two resolutions, if adopted, will join the numerous other requests for legislative studies.

Legislators will individually rank the study proposals in order of preference, and interim committees will be appointed to undertake the top-ranking studies.

Aklestad's SJR30 drew support from Senate President Jean Turnage, R-Polson, and the attorney general's office. No one opposed it.

The Shelby senator said he doesn't want to eliminate the rights of an accused person to appeal his conviction. But Aklestad said he hopes the study can find ways to close some loopholes that allow convicted criminals to keep filing appeals.

Aklestad said he would like to see criminals limited to filing a single, all-encompassing appeal to resolve all issues rather than a string of individual appeals.

He said the situation has gotten "ridiculous" in the McKenzie case in which his lawyers filed one 700-page [illegible] the normal length is 30-40 pages.

McKenzie's appeal already has been before the U.S. Supreme Court and the Montana Supreme Court three times each, the senator said.

Aklestad said he has petitions from numerous persons who want to "take the abuse the the appeal system"

Senate President Jean Turnage: "Delay always benefits the criminal. If you're trying to delay, you can grasp at anything at all... You let the grass grow on the victim's grave and you've got a better shot at it."

away from McKenzie. He acknowledged, however, that the study probably wouldn't affect the McKenzie case but could prevent similar delays in the future.

Turnage, a lawyer, cited appeals by defendants in the workman's compensation cases as another example of abusing the appeal system.

He, too, backed the idea of a single appeal.

Otherwise, he said, lawyers for a defendant who is "guilty as sin" will "dribble in the applications one at a time."

"Delay always benefits the criminal," he said. "If you're trying to delay, you can grasp at anything at all. It doesn't have to be meritorious."

"You let the grass grow on the victim's grave and you've got a better shot at it," he added.

The net effect of the delays caused by appeals, Turnage said, is "you can have someone like McKenzie die of old age" before his sentence is carried out.

Turnage rejected suggestions that the study also investigate delays in civil cases.

The Montana Supreme Court has "slapped the hands" of attorneys who have filed frivolous appeals in civil cases but has never done so over criminal appeals, Turnage said.

John Maynard, an assistant attorney general, backed the study as a method that could lead to clarification of the laws.

It also could be used to gather information for legislators and their constituents "so some of the sluggishness of the criminal justice system could be understoood," he said.

Although no one opposed the resolution, Rep. Dan Yardley, D-Livingston, also a lawyer, said the U.S. Supreme Court's indecisiveness on the death penalty had contributed to the many appeals filed in cases involving capital punishment.

SB 2

EXHIBIT "B"
January 19, 1983

EXHIBIT "C"
January 19, 1983

Following is information obtained from the Attorney General's office:

STATE VS. MCKENZIE

Date of Offense	1-21-74
Date of Conviction--District Court Jury Trial	2-01-75
Appeal submitted following argument before Montana Supreme Court	9-03-76
Decision issued	11-12-76
Rehearing denied	1-10-77
Judgment vacated and care remanded by United States Supreme Court	6-27-77
Case re-submitted following argument before Montana Supreme Court	3-13-78
Decision issued	6-07-78
Rehearing denied	7-25-78
Judgment vacated and case remanded by United States Supreme Court	6-25-79
Case re-submitted following argument before Montana Supreme Court	10-29-79
Decision issued	2-26-80
Rehearing denied	3-31-80
Certiorari denied by United States Supreme Court	12-08-80
Filed for post-conviction relief	1-07-81
Denied	2-27-81
Appealed to Montana Supreme Court	3-03-81

This is where the case stands at this time.

NAME: John Maynard DATE: 1/19/83

ADDRESS: Justice Building - 215 North Sanders

PHONE: 449-2026

REPRESENTING WHOM? Attorney General

APPEARING ON WHICH PROPOSAL: SB 2

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: see attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

TESTIMONY - SB 2

JOHN MAYNARD - ASSISTANT ATTORNEY GENERAL

I SUGGESTED THIS BILL TO THE JOINT SUBCOMMITTEE ON THE JUDICIARY BECAUSE OF MY EXPERIENCE IN TWO CAPITAL CASES AND IN THE CASE OF SANDSTROM V. MONTANA, AS WELL AS NUMEROUS SUBSEQUENT APPEALS AND PETITIONS FOR POST CONVICTION RELIEF. THE BILL APPLIES ONLY TO CRIMINAL APPEALS.

§46-20-702 CURRENTLY CONTAINS TWO SENTENCES. 1) THE FIRST SETS A STANDARD FOR REVIEWING ALLEGED ERRORS ON APPEAL. ERRORS FOUND TO BE "PREJUDICIAL TO SUBSTANTIAL RIGHTS" ARE DISREGARDED. THIS IS COMMONLY CITED BY OUR SUPREME COURT AS THE STATUTORY BASIS FOR "HARMLESS ERROR". 2) THE SECOND SENTENCE SPEAKS OF JURISDICTIONAL OR CONSTITUTIONAL RIGHTS AND PERMITS THE MONTANA SUPREME COURT TO REVIEW THEM REGARDLESS OF WHETHER THE ALLEGED ERROR WAS OBJECTED TO AT TRIAL. "PLAIN ERR"

TAKEN AS A WHOLE THE STATUTE IS VAGUE AND ELASTIC IN APPLICATION AND NEEDS SOME CLARIFICATION BY THE LEGISLATURE. THE BILL'S RAMIFICATIONS REACH BEYOND OUR MONTANA SUPREME COURT, HOWEVER, AND SHOULD BE UNDERSTOOD.

WHEN ENACTED IN 1967 THE PURPOSE OF THIS SECTION, MODELED AFTER ILLINOIS LAW, WAS TO PERMIT A PROBLEM TO BE SETTLED IN STATE COU

RATHER THAN IN FEDERAL COURT. FIFTEEN YEARS LATER WITH INCREASING PRISON POPULATIONS IT SIMPLY MEANS STATE COURT AND THEN FEDERAL COURT. AND IT IS BECAUSE OF THE ABSENCE OF A 'CONTEMPORANEOUS OBJECTION' PROVISION IN OUR LAW THAT VIRTUALLY ALL CLAIMS CAN BE LITIGATED IN BOTH FORUMS. (USUALLY CLAIMS ARE BASED ON DUE PROCESS)

BECAUSE OF THE BURDEN ON FEDERAL COURTS RESTRICTIONS HAVE BEEN ESTABLISHED IN CASES SUCH AS WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) AND ENGLE V. ISAAC, 102 S.Ct. 1558 (1982). MONTANA CANNOT AVAIL ITSELF OF THESE RULES BECAUSE OF INCONSISTENT APPLICATION OF OUR CONTEMPORANEOUS OBJECTION REQUIREMENT DEVELOPED IN CASE LAW AND THE EXISTENCE OF THE "PLAIN ERROR" RULE.

THE BILL IS BASED ON CONGRESSIONAL HABEAS CORPUS BILL DEVELOPED BY FLORIDA ATTORNEY GENERAL JIM SMITH. SUBSEQUENT TO ITS DEVELOPMENT THE U.S. SUPREME COURT DECIDED ENGLE V. ISAAC, ELABORATING ON WAINWRIGHT V. SYKES.

WAINWRIGHT ADDRESSED ENDLESS LITIGATION, SANDBAGGING CLAIMS, AND "PLANTING ERROR", THE ULTIMATE DEFENSE TACTIC. SB 2, ADDRESSES THE PROBLEMS OUTLINED IN WAINWRIGHT AND ENGLE AND MAKES THEIR WAIVER PRINCIPLES APPLICABLE IN MONTANA

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MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
January 20, 1983

The eleventh meeting of the Senate Judiciary Committee was called to order by Chairman Jean A. Turnage on January 20, 1983 at 10:00 a.m. in Room 331, State Capitol.

ROLL CALL: All members were present, except for Senator Daniels who was excused.

CONSIDERATION OF SENATE BILL 114:

Senator Thomas, sponsor of this bill, explained that it is being introduced in order to ensure that articles of personal property and suicide notes can be returned to the decedent's family in the event of an untimely death or suicide. The bill provides that the articles could be held by a state medical examiner or a coroner for investigative purposes or a 90 day period after receipt of the property. Senator Thomas acknowledged the need to amend the bill so as not to impede the investigation process. His intent is merely to establish some procedure for the return of property.

Sarah Harold stated that she requested the drafting of this bill because of her involvement with the Hospice Program at St. Peter's Hospital. She has worked with people in grief and has noted that because they were unable to ascertain the personal belonging of the decedent, their grieving was more intense. She felt there was a definite need to clarify our laws.

Pat Trafton, a psychological social services director with the Hospice Program, and Jim Palmer, a Hospice volunteer, also spoke in support of this bill and distributed Exhibits "A" and "B".

Phyllis Burke, whose husband had committed suicide, shared her experiences with the Committee. She was unable to obtain her husband's suicide note even though there was no investigation. After 9 months, a court order and many hours of attorney time and knocking on doors, she finally was able to have the note returned to her.

Justine Breckenridge, whose son had committed suicide, was also unable to obtain her son's last letter which had been addressed to her. It was very important for her to possess the original letter. She was very supportive of the need for this bill.

Marc Racicot, representing the County Attorney's Association, stated he had looked at the bill from an investigative standpoint. He could understand the delicate situation, but said there were legitimate law enforcement reasons for keeping the decedents' notes. Sometimes suicides turn out to be homicides. He has

DISPOSITION OF SENATE BILL 2: Senator Brown moved that SB2 DO PASS. This motion carried seven to two with Senators Berg and Crippen voting in opposition.

ADJOURN: There being no further business before the Committee, the meeting was adjourned at 11:40.

Jean A. Turnage

JEAN A. TURNAGE
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

48th LEGISLATIVE SESSION - - 1983 Date 1-20-83

NAME	PRESENT	ABSENT	EXCUSED
Berg, Harry K. (D)	✓		
Brown, Bob (R)	✓		
Crippen, Bruce D. (R)	✓		
Daniels, M. K. (D)			✓
Galt, Jack E. (R)	✓		
Halligan, Mike (D)	✓		
Hazelbaker, Frank W. (R)	✓		
Mazurek, Joseph P. (D)	✓		
Shaw, James N. (R)	✓		
Turnage, Jean A. (R)	✓		

Each day attach to minutes.

STANDING COMMITTEE REPORT

January 20 19 83

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration Senate Bill No. 2

Aklestad

Respectfully report as follows: That Senate Bill No. 2

(Introduced)

DO PASS

Jean A. Turnage, Chairman.

STATE PUB. CO.
Helena, Mont.

H.C.

23

STATUS SHEET

HOUSE JUDICIARY COMMITTEE

48TH Legislature

Bill No.	Subject Matter	Date In	Sponsor	Hearing Date	Committee Action	Date Out
SB 2	Criminal procedure, appellate review, prohibiting in certain circumstances	1/26/83	Sen. Aklestad	3/16/83	Be Concurred In	3/22/83
SB 4	Crime procedure, requiring appellant to order in writing a transcript	1/17/83	Sen. Mazurek	3/10/83	Be Concurred In	3/10/83
SB 7	Capital punishment, permitting condemned to be confined at state prison at state expense pending execution	1/20/83	Sen. Aklestad	3/16/83	Be Concurred In	3/16/83
SB 14	To clarify the law relating to termination of the parent-child relationship; amending section 41-3-603, MCA	1/10/83	Sen. Mazurek	1/14/83	Do Pass Consent Calendar	1/14/83
SB 15	To change infant to minor where appropriate throughout code in order to achieve consistency with Title 41, MCA	1/10/83	Sen. Mazurek	1/17/83	Do Pass Consent Calendar	1/17/83
SB 23	Providing for the streamlining of hearings after the issuance of a preliminary decree in the general adjudication of water rights	2/10/83	Sen. Hager	3/15/83	Be Not Concurred In	3/15/83

Form CS-32
1-79

hc

MINUTES OF JUDICIARY COMMITTEE
March 16,1983

The meeting of the House Judiciary Committee was called to order in room 224A of the capitol building, Helena, Montana by Chairman Dave Brown. All members were present, including Brenda Desmond, Staff Attorney for the Legislative Council.

SENATE BILL 394

SENATOR BOB BROWN, District 10, stated that this bill allows a person sentenced to death to choose between hanging and a lethal injection; Montana is one of the four jurisdictions in the English-speaking world that still hangs its condemned prisoners; this bill also requires that the execution take place in the penitentiary rather than under the jurisdiction of the county sheriff in the county where the crime was committed; and he stated that it had some retroactive provisions amended in, so that it would apply to those who are sentenced to death at this time.

CHRIS TWEETEN, Assistant Attorney General, said that he was appearing on behalf of JOHN MAYNARD, who prepared written testimony, which was presented to the committee. See EXHIBIT A.

There were no further proponents and no opponents.

CURT CHISHOLM, Deputy Director of the Department of Institutions, said that this bill affects them directly in terms of being ultimately responsible for the execution of inmates; plus it changes the method of execution; it changes the designation of place of execution from the county in which the trial was heard; it changes the person responsible for supervising the execution from the sheriff of the county of conviction to the warden of the Montana State Prison; and it allows the warden to designate an official executioner. He indicated that the position of the department is that they support the method of execution proposed in this bill; but, because it is a burdensome responsibility, they would just as soon avoid the warden being responsible for the supervision of the execution; and in relation to the place of execution, he felt it made sense to have a centralized place or facility to accommodate the execution itself, especially if they are considering an execution by a chemical substance.

REPRESENTATIVE ADDY noted that they were paying $10.00 a day to the prison to house this prisoner and he asked what was their actual cost. MR. CHISHOLM responded that it is about $33.00 a day; that the contract has not changed since it was negotiated back in 1975.

REPRESENTATIVE ADDY asked what the medical costs were. MR. CHISHOLM replied that the inmate in question here attempted suicide about two or three years ago and he required medical attention. He explained that this was born by the county as that was part of the contract.

REPRESENTATIVE BERGENE asked if there was another appeal pending for Mr. McKenzie. CHRIS TWEETEN, Assistant Attorney General, replied that there is at least one more appeal pending, if not more than that.

There were no further questions and the hearing on this bill was closed.

SENATE BILL 2

SENATOR AKLESTAD, District 6, stated that this was a bill which deals with prohibiting appellate review of alleged errors not objected to during a criminal trial. He presented to the committee a petition signed by taxpayers, who supported this type of legislation. See EXHIBIT E. He indicated that the main thrust of the bill is to cut down on the abuse of the appeal system.

CHRIS TWEETEN, Assistant Attorney General for the state of Montana, offered prepared testimony prepared by JOHN MAYNARD, who could not appear on this date. See EXHIBIT F.

MARC RACICOT, Prosecution Coordinator for the County Prosecutor Services of the Department of Justice, said that he was appearing for the county attorneys and the primary reason they were in favor of this legislation is because the constant review and reexamination of these cases is eating up their resources. They feel that there is never a final decision ever made.

REPRESENTATIVE UNDERDAL, District 12, said that the continuous appeals of those under the death sentences have caused frustration by the law-abiding citizen, especially when the appeals are based, not on the question of guilt, but on technicalities.

JO BRUNNER, representing herself, said that she believed the appeal system is grossly misused and gave two examples in which she was involved in cases where they were appealed on technicalities.

REPRESENTATIVE CURTISS, District 20, testified that the interim committee spent many long hours trying to determine some ways to tighten up the appeals system and they found in their study that it is not the judiciary system itself that is the problem; it is not the law; the problem is in human error; and by use of the appeal system, the litigants are capitalizing on human error.

There were no further proponents.

BILL LEAPHART, representing himself and the American Civil Liberties Union, indicated that his objection to this bill is that it will allow the appeal court, under certain situations, to overlook jurisdictional defects. He contended that the Montana Supreme Court has not gone so far as to say that these defects can be overlooked is because that goes to the very heart of the judiciary - the power that the court has - either the court has the power or the court does not have the power; and it is a well-accepted legal principle that a jurisdictional defect cannot be overlooked.

There were no further opponents.

SENATOR AKLESTAD said that they have heard some innuendos, but he would hope that this committee would look through the smoke and see the trees and the trees, in this case, are the people that they are representing; and the people of this state are very concerned about the abuses to the appeal systems. He emphasized that they are not wanting to take the appeal system away from the people, but they are just trying to tighten it up.

REPRESENTATIVE KEYSER asked if the language on page 2, lines 4 through 16 did not basically handle any legitimate problems with an attorney who did not represent his client the first time and any legitimate appeals. MR. RACICOT replied that, in his view, yes and in the view of all the people who worked on this in the subcommittee on judiciary for many months.

CHAIRMAN BROWN inquired if it was not true that after more thorough research through the records after the trial that a question will come up that is not necessarily due to the caginess of the counsel during the course of the trial. MR. RACICOT replied that he felt that occurs, but it is a rare occasion and if it is so substantial, it is going to reflect on the effectiveness of the counsel, this bill allows this on page 2, lines 13 through 16.

CHAIRMAN BROWN indicated that he thought that in some parts of this bill they are penalizing clients for having ineffective counsel. MR. RACICOT replied that he can understand that viewpoint, but he does not see it that way.

REPRESENTATIVE JENSEN asked Mr. Tweeten if he would acknowledge that there are different levels of competence among attorneys in general. MR. TWEETEN replied certainly.

REPRESENTATIVE JENSEN asked if this was true with defense attorneys particularly. MR. TWEETEN responded certainly.

REPRESENTATIVE JENSEN questioned if it is possible that someone on the less competent end of that scale would without being intentionally devious not raise an objection to an error. MR. TWEETEN responded that he did not want to give the impression that all defense attorneys are devious; he felt that, in many cases, when a defect is not objected to during the trial, the attorney may have overlooked it; but there certainly are cases where the defense attorney does try to deceive the court.

REPRESENTATIVE JENSEN inquired that, if that attorney honestly overlooked an error and after the trial upon consideration or review, he realizes this error and it reflects on poor or incompetent representation, is this attorney likely to raise that error. MR. TWEETEN responded

that he felt it depended to a great extent on what kind of error it is and to the extent on which it reflects on the attorney's competence; that he personally has argued appeals wherein an attorney has requested that the court not hold against the defendant the counsel's incompetence. He also indicated that there are many cases wherein the the attorney prosecuting the appeal is not the same attorney that tried the case.

REPRESENTATIVE JENSEN wondered in those situations where the same attorney is involved and there is an error that would reflect against that attorney, who, in fact, raises that there was an error; if the attorney does not raise that error, would the defendant have the ability to recognize that there was an error. MR. TWEETEN answered that he would not; that is why the bill allows for the consideration of this kind of a problem by affording collateral review.

REPRESENTATIVE JENSEN asked who raises that. MR. TWEETEN responded that the defendant would have the option of raising it himself; if he is sent to prison, the jail house lawyer could point this out to him and he could write on this matter; or if he has money, he could retain another attorney.

REPRESENTATIVE JENSEN asked if there is some guarantee here that that individual won't be denied an appeal on the basis of a real error. MR. TWEETEN answered that no there is no quarantee that he is going to be able to raise that issue: and if the individual is not perceptive enough to recognize that the attorney has been ineffective, he is not going to raise that issue.

REPRESENTATIVE BERGENE commented that she generally is in support of this bill but she is troubled about the possibility of the unconstitutionality of it. MR. TWEETEN replied that the bill incorporates standards for review and to this extent they can assume that it is constitutional.

REPRESENTATIVE CURTISS noted on the bottom of page 1, lines 24 and 25, the language reads "substantial rights" and she wondered what this would mean. MR. TWEETEN responded that this would mean any constitutional defect, i.e. erroneous rulings involving certain seizures issues, etc.

REPRESENTATIVE CURTISS asked if it was his considered opinion that a person's constitutional and substantial rights would still be protected under this bill. MR. RACICOT replied yes.

CHAIRMAN BROWN indicated that he was always mindful, when he went to the doctor, that half of them graduated in the bottom half of their class, and he viewed lawyers in the same light. He wondered, in the discussions that led to this bill, if there was concern about competency of counsel and what that would do to the rights of the defendant. SENATOR AKLESTAD replied that it was brought up during the interim by some of the individuals; he felt that they have taken care of all the aspects that they possibly could; and that the individual is being protected as much as possible and still have a bill. He emphasized that he hoped they did not get hung up on technicalities, when the vast majority of the people in the state of Montana are concerned and feel that something has to be done.

There were no further questions and the hearing on this bill was closed.

SENATOR AKLESTAD indicated that REPRESENTATIVE KEYSER would carry the bill on the floor of the House.

EXECUTIVE SESSION

SENATE BILL 7

REPRESENTATIVE KEYSER moved that this bill BE CONCURRED IN. REPRESENTATIVE JENSEN seconded the motion. The motion carried with all voting aye.

The committee took a break at 10:25 a.m. and reconvened at 10:45 a.m.

SENATE BILL 394

REPRESENTATIVE KEYSER moved that this bill BE CONCURRED IN. REPRESENTATIVE CURTISS seconded the motion.

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL SENATE BILL 2 DATE March 16, 1983

SPONSOR SENATOR AKLESTAD

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Chas Tweeten	Helena	Attorney General	✓	
Walter L. Hammermeister	Conrad	Sheriff	✓	
Rep. G. Rousse	Cut Bank	H. Dist #13	✓	
Rep Melvin Underdal	Shelby	H Dist 12	✓	
Bill Leaphart	Helena	ACLU		✓
Carolyn Carter		Dist 20	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

SB2
Exhibit D

3-16-83

Following is information obtained from the Attorney General's office:

STATE VS. MCKENZIE

Date of Offense	1-21-74
Date of Conviction--District Court Jury Trial	2-01-75
Appeal submitted following argument before Montana Supreme Court	9-03-76
Decision issued	11-12-76
Rehearing denied	1-10-77
Judgment vacated and care remanded by United States Supreme Court	6-27-77
Case re-submitted following argument before Montana Supreme Court	3-13-78
Decision issued	6-07-78
Rehearing denied	7-25-78
Judgment vacated and case remanded by United States Supreme Court	6-25-79
Case re-submitted following argument before Montana Supreme Court	10-29-79
Decision issued	2-26-80
Rehearing denied	3-31-80
Certiorari denied by United States Supreme Court	12-08-80
Filed for post-conviction relief	1-07-81
Denied	2-27-81
Appealed to Montana Supreme Court	3-03-81

This is where the case stands at this time.

SB 2

Exhibit E

Conrad, Montana
March 20, 1981

3-16-83

Senator Aklestad
Montana State Capitol
Helena, Montana 59601

Dear Senator Aklestad:

We the undersigned wish to support your efforts to plug the holes to limit the number of appeals that the tax payer must pay for as reported in the Independent Observer issue of March 19, 1981 under the title "Its time to quit making a mockery out of the McKenzie Case". Anything you can do to end this will be appreciated.

Name	Address
Martha Copenhaver	306 Horizon Lodge, Conrad MT
Kirk E Copenhaver	" "
Doris E Kid	509 " "
Edna Hostetler	511 Horizon Lodge Conrad
[illegible] Cardwell	301 Central Conrad
Roger Moan	6 North First Conrad, MT
Lucy Mattinger	216 Horizon Lodge Conrad MT
William Kittay	
Charlotte McKlam	Horizon Lodge # 412
Hannie C. Miam	Horizon Lodge 106
Ena Hake #410	Horizon Lodge Conrad MT
Steve Kovatch	
Ruth F. Wengel	1 Mile East Horizon Lodge #301 104
Mr & Clara F. Yeager	405 Horizon Lodge Conrad Mt
Mr. & Mrs. A. E. Sperleder	apt. 506 Horizon Lodge " "
Howard V. Alley	Horizon Lodge apt #13 Conrad Mont
Mary Kirk Alley	Horizon Lodge #213 Conrad Mont 59425
Pearl Bowman Ekland	Horizon Lodge Box 313 Conrad Mont
Oscar Ekland	Horizon Lodge #313 - Conrad Mont 59425
Dan's Dunmore	Horizon Lodge Apt 518 - Conrad MT #59425
Florence McWalters	Horizon Lodge Conrad Montana 59425
Lillian Krueger	219 Horizon Lodge Conrad, Mont 59425
Glenda Moritz	406 Horizon Lodge, Conrad, Mt. 59425
Mike Moritz	406 " " "
Gladys Bowrow	212 Horizon Lodge Conrad MT 59425
Harry Heagle	215 Horizon Lodge Conrad Mont 59426
Irvin F. Koetke	413 " " " " "
Ora Hickum	401 Horizon Lodge Conrad Mont.
Olga Swanson	Horizon Lodge Conrad Mont

Name	Address
Estella C. Litton	2403 Horizon Lodge Conrad, Mont. 59425
Oscar Berland	Horizon Lodge Room 404
Minnie Berland	Horizon Lodge Room 404
Ethel L. Seifert	Horizon Lodge Room 304 " "
Alice M. Fockler	Horizon Lodge Room 205
David Vos	Horizon Lodge 310
Jesse Shoy	Horizon Lodge 411
Irene Baumgardner	Horizon Lodge 312
Lottie Thomas	" " 101
Katrina V. Tracy	Horizon Lodge Room 202
Nina Berland	Horizon Lodge Room 214
alba miles	Horizon Lodge room 309
Leo Zier	Horizon Lodge apt 311
Clara Klemenhagen	1000 4th S W. Conrad, Mt.
Olive Wheaby	Conrad,
Gladys M. Pourroy	Conrad, mont 212
Lavina Hungerford	Horizon Lodge 206
Barbara Wolverton	Conrad Mont.
Vilma Coldwell	conrad, mt. 59425

TESTIMONY OF JOHN H. MAYNARD

ASSISTANT ATTORNEY GENERAL

SENATE BILL 2

HOUSE JUDICIARY COMMITTEE

MARCH 16, 1983

Exhibit F
SB2
3-16-83

Senate Bill 2 was suggested to the joint subcommitte on the judiciary because of our experience in capital cases, Sandstrom v. Montana, and numerous subsequent appeals and petitions for post-conviction relief. The bill applies only to criminal appeals.

Section 46-20-702, MCA, currently contains two sentences.

> 46-20-702. Types of errors noticed on appeal. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Defects affecting jurisdictional or constitutional rights may be noticed although they were not brought to the attention of the trial court.

The first sentence sets a standard for reviewing alleged errors on appeal. Errors not found to be "prejudicial to substantial rights" are disregarded. This is commonly cited by our Supreme Court as the statutory basis for "harmless error." The second sentence speaks of jurisdictional or constitutional rights and permits the Montana Supreme Court to review those errors regardless of whether the alleged error was objected to at trial. This is commonly referred to as "plain

error." Taken as a whole, the statute is vague and elastic in application and needs clarification by the legislature. The bill reaches beyond the Montana Supreme Court, however, and into federal court review of state court convictions.

When enacted in 1967, the purpose of this section, modeled after Illinois law, was to permit a problem to be settled in state court rather than in federal court. Fifteen years later, however, the statute simply means that the error can first be reviewed in state court and then in federal court. It is because of the absence of a contemporaneous objection provision in our law that virtually all claims must be fully litigated in both forums.

Because of the burden on federal courts, restrictions have been established with respect to which claims can be brought to their attention in federal habeas corpus actions. Those cases include Wainwright v. Sykes, 433 U.S. 72 (1977); and Engle v. Isaac, 102 S. Ct. 1558 (1982). Montana cannot avail itself of these well founded rules, however, because of inconsistent application of our contemporaneous objection requirement in case law and the existence of a rather ambiguous plain error rule. The bill is based on a congressional habeas corpus bill developed by Florida Attorney General Jim Smith. Subsequent to its development the United States Supreme Court decided Engle v. Isaac elaborating

on Wainwright v. Sykes, and further spelling out the concerns involved in contemporaneous objection policies. Wainwright addressed piecemeal litigation, sandbagging claims, and "planting error," the ultimate defense tactic of questionable ethics. This bill permits the state court to review every issue and more than a federal court must review in light of Engle v. Isaac. In order to bring an error to the attention of a federal court or, under this bill, in state court, where the error has not been objected to, a defendant must demonstrate cause for his failure to object and prejudice resulting from his failure to object. These are the principles of Wainwright v. Sykes, and Engle v. Isaac. They inject finality in criminal proceeding, which under the current state of the law in Montana is impossible to achieve.

Senate Bill 2 does not mean that an individual cannot appeal his conviction. It does not mean that he cannot raise any issue that he wishes to raise on appeal. It simply means that the trial court must have the opportunity, in the first instance, to correct the alleged error and permit the trial to proceed. This fairness in relation to the state and state court system enhances justice and encourages active defense by encouraging the quick identification of alleged error and resolution at the time an error is alleged.

MINUTES OF THE JUDICIARY COMMITTEE
March 22, 1983

The meeting of the House Judiciary Committee was called to order by Chairman Dave Brown at 9:07 a.m. in room 224A of the capitol building, Helena, Montana. All members were present as was Brenda Desmond, Staff Attorney for the Legislative Council.

EXECUTIVE SESSION

SENATE BILL 237

REPRESENTATIVE JENSEN moved that this bill BE CONCURRED IN. The motion was seconded by REPRESENTATIVE BERGENE.

CHAIRMAN BROWN passed out copies of proposed amendments that were discussed with Senator Halligan. He said that Senator Eck was here relating to her bill, SB 391, in case there were any questions that the committee wished to ask.

REPRESENTATIVE CURTISS indicated that she had some real problems with one of the remarks that was made yesterday wherein she said that they are now making a profit off that program for Cascade County, and she did not understand how they could be making a profit if the restitution is to be made to the victims of the crime, how they could have anything left over for the county.

REPRESENTATIVE JENSEN replied that he asked them and they said that they were making a little on short term interest; when they receive funds before the distribution of those funds, they accrue some money in those funds for a few days and they are interest-bearing funds and that is the only excess revenue that they have. He said that he did not get any figures from her, but apparently it is not all that much money. He felt that if they were going to have some money sitting in a bank account, they should draw some interest.

REPRESENTATIVE BERGENE stated that this reduces the cost that the county has.

REPRESENTATIVE CURTISS wondered if this bill mandates that one of these restitution officers be set up in all of these counties. She noted that they were apparently able to do that in some of the counties now, but she wanted Ms. Desmond to resond to this.

REPRESENTATIVE KEYSER said that he dealt with some small area judges and he felt that they were about equal; the judges are not too tough about excusing people - not near as tough as he thinks they should be; and he has no more problem with the clerk of the court than he does with the judge.

REPRESENTATIVE RAMIREZ indicated that their objective was to make it a little tougher for people to be excused; we have some judges who are really tough, and with the Senate language, they are probably going to exercise pretty good control; and for the ones who are lax, if they leave it with the judges, at least they have a chance to see if the clekrs might be a little tougher; and if they are not tougher, they could put some standards in down the road. He finalized that he was willing to go with the bill as it is and see how it works.

CHAIRMAN BROWN noted that they had one judge in Butte, Arnold Olson, who requires that you must be on your death bed in order to be excused from jury duty, and he will even question that too.

There were no further questions or discussion and the motion carried with REPRESENTATIVE SPAETH, REPRESENTATIVE DAVE BROWN, REPRESENTATIVE EUDAILY and REPRESENTATIVE SEIFERT voting no. The vote was 15 to 4.

SENATE BILL 2

REPRESENTATIVE KEYSER moved that the bill BE CONCURRED IN. The motion was seconded by REPRESENTATIVE HANNAH.

REPRESENTATIVE KEYSER said that the provision to handle the constitutional problems or any other problems that were brought up in the testimony are definitely handled on the next page, and he would assume that those are Senate amendments. He then said that this was new language that was put in, but he felt that it was well covered and he does not have any problem with it. He continued that there was definitely protection for the man who has had an incompetent attorney that has not done the job for him; and he

thought that on line 13, page 2, subsection 3, where it says, "material and controlling facts upon which the claims is predicated were not known to the defendant or his attorney and could not have been ascertained by the exercise of reasonable diligence" that this would give him all the coverage he needs. He did not think there was any testimony that this did not protect the defendant.

REPRESENTATIVE SPAETH said that he at first was hesitant about this bill, but he felt that it was a matter of fairness that a person, when he is at trial, that his attorneys will make deliberate decisions about when they will object or not object, and if he decides not to object, this gives him a second time around, the way the law is presently directed. He commented that if the attorney fails to object and he does not know why he did not object, he may have incompetent counsel. He closed by saying that he thought it was a good bill.

REPRESENTATIVE ADDY noted that when it comes to jurisdictional rights, the court can raise these questions on its own motion; he felt that this bill was headed in the right direction.

REPRESENTATIVE FARRIS commented that when she first heard this, she felt hampered by not being a lawyer or not being around courts very much; but she is looking at it from the point of view of a person who is not a lawyer and is not around the courts very much. She thought that in reading the last section, there may be something that is not known to the defendant or the attorneys; the attorney could know things that the defendant does not know and if the attorney got squished in a car accident, the defendant could be sitting in jail knowing nothing and he would not have the right to appeal. She contended that you cannot claim constitutional rights if you did not do it when you were talking about it in the trial and this did not make any sense to her. She stated that she certainly wanted to limit appeals as much as anyone else but she felt that this was a bad bill and she contended that it does not make sense to put this kind of pressure on people to notice everything that is going

on around them during the stress and strain of a trial; and then say, well, if you did not speak up then you do not have a chance to speak at all.

REPRESENTATIVE CURTISS pointed out that the interim committee on judiciary worked very hard on this over a two-year period; they had a lot of testimony, they had attorneys, they had the attorney general's people; the judges commented and it did not seem to be that big a problem. She felt it was an area that has to be addressed if they are going to tighten up the appeals system.

REPRESENTATIVE ADDY declared that this bill addresses what questions can be appealed in the state system and it does not foreclose going to the federal system after going through the state system. He contended that this will not bar anybody from saying that their constitutional rights have been violated and kicking it over into the federal system.

There was no further discussion and the motion carried with a vote of 13 ayes and 6 nos. See ROLL CALL VOTE.

REPRESENTATIVE KEYSER will carry the bill on the floor of the House.

SENATE BILL 201

REPRESENTATIVE ADDY moved that the bill BE CONCURRED IN. The motion was seconded by REPRESENTATIVE JENSEN.

REPRESENTATIVE ADDY moved to amend each section of the bill by inserting at the end of each section the following language: "Nothing in this section shall be construed to prohibit the prosecutor from granting immunity from prosectution on account of any transaction, matter, or thing concerning which a witness is compelled to testify if the prosecutor determines, in his sole discretion, that the ends of justice would be so served." He explained that what they are saying is that when a prosecutor does not think he needs to grant transactional immunity; when the prosecutor gets into a situation where he feels that they are not going to get the cooperation of the codefedant, the prosecutor does have the option

STANDING COMMITTEE REPORT

March 22, 19 93

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 2

third reading copy (blue)
Color

A BILL FOR AN ACT ENTITLED: "AN ACT PROHIBITING, EXCEPT UNDER CERTAIN CIRCUMSTANCES, APPELLATE REVIEW OF ALLEGED ERRORS NOT OBJECTED TO DURING A CRIMINAL TRIAL; AMENDING SECTIONS 46-20-104 AND 46-20-702, MCA."

Respectfully report as follows: That SENATE Bill No. 2

BE CONCURRED IN
DO ~~NOT~~

Dave Brown, Chairman.

STATE PUB. CO.
Helena, Mont.

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ROLL CALL VOTE ------ JUDICIARY COMMITTEE

	Date: 3/22 No: SB 391 Be Concurred In As Am.	Date: 3/22 No: SB 2 Be Concurred In	Date: 3/22 No: SB 313 Be Concurred In	Date: No:	Date No:	Date No:	Date: No:
BROWN, Dave	yes	no	no				
ADDY, Kelly	yes	yes	yes				
BERGENE, Toni	---	yes	yes				
BROWN, Jan	yes	no	yes				
CURTISS, Aubyn	no	yes	yes				
DAILY, Fritz	no	yes	no				
DARKO, Paula	yes	no	yes				
EUDAILY, Ralph	no	yes	no				
FARRIS, Carol	yes	no	yes				
HANNAH, Tom	no	yes	yes				
IVERSON, Dennis	yes	yes	no				
JENSEN, James	yes	no	no				
KENNERLY, Roland	no	yes	no				
KEYSER, Kerry	no	yes	yes				
RAMIREZ, Jack	no	yes	yes				
SCHYE, Ted	yes	yes	yes				
SEIFERT, Carl	yes	yes	no				
SPAETH, Gary	yes	yes	yes				
VELEBER, Dennis	yes	no	yes				
	11 - 7	12 - 7	12 - 7				

SENATE BILL NO. 2

INTRODUCED BY AKLESTAD

BY REQUEST OF THE JOINT SUBCOMMITTEE ON JUDICIARY

A BILL FOR AN ACT ENTITLED: "AN ACT PROHIBITING, EXCEPT UNDER CERTAIN CIRCUMSTANCES, APPELLATE REVIEW OF ALLEGED ERRORS NOT OBJECTED TO DURING A CRIMINAL TRIAL; AMENDING SECTIONS 46-20-104 AND 46-20-702, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 46-20-104, MCA, is amended to read:

"46-20-104. Scope of appeal by defendant. (1) An appeal may be taken by the defendant only from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant.

(2) Upon appeal from a judgment, the court may review the verdict or decision and any ~~order or decision~~ alleged error objected to which involves the merits or necessarily affects the judgment. Failure to make a timely objection during trial constitutes a waiver of the objection except as provided in 46-20-702."

Section 2. Section 46-20-702, MCA, is amended to read:

"46-20-702. Types of errors noticed on appeal. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. ~~Defects~~ No claim alleging an error affecting jurisdictional or constitutional rights may be noticed ~~although they were not brought to the attention of the trial court~~ on appeal if the alleged error was not objected to as provided in 46-20-104, unless the defendant establishes that the error was prejudicial as to his guilt or punishment and that:

(1) the right asserted in the claim did not exist at the time of the trial and has been determined to be retroactive in its application;

(2) the prosecutor, judge, or a law enforcement agency suppressed evidence from the defendant or his attorney that prevented the claim from being raised and disposed of; or

(3) material and controlling facts upon which the claim is predicated were not known to the defendant or his attorney and could not have been ascertained by the exercise of reasonable diligence."

-End-

REFERENCE BILL